A **THE GOVERNMENT OF INDIA**

v.

CAIRN ENERGY INDIA PTY LTD & ANOR

B FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
MOHD GHAZALI YUSOF FCJ
RAUS SHARIF FCJ
[CIVIL APPEAL NO: 02(f)-7-2010(W)]
C 11 OCTOBER 2011

ARBITRATION: *Award - Setting aside - Finality of arbitrator's award and jurisdiction of High Court to review - Decision of arbitral tribunal - Whether issue involved a mixed question of fact and law -*
D *Whether award tainted with illegality - Whether High Court has jurisdiction to set aside decision of arbitral tribunal*

ARBITRATION: *Agreement - Effect of - Application of foreign law - Whether Malaysian courts can give effect to agreement of parties to apply*
E *foreign law to govern arbitration - Seat of arbitration in Malaysia - Whether curial law ought to be that of the seat of arbitration - Whether Malaysian law may be applied exclusively to decide scope of intervention*

ARBITRATION: *Arbitrator - Finding of facts - Questions of fact considered - Whether altered specific nature of reference - Whether majority*
F *arbitrators interpreted agreement in the manner parties agreed upon - Whether there were elements of illegality in award handed down by majority arbitrators - Whether arbitrators proceeded illegally*

The appellant had entered into an oil and gas joint venture with
G the respondents who were involved in the development of an area which was situated off the coast of India. The parties entered into a Production Sharing Contract ("PSC") to this effect. Dispute arose between the parties regarding the costs recoveries claimed by the respondents and the calculation of Post Tax Rate of
H Return (PTRR) as computed by the respondents. The parties therefore referred six points for arbitration; four of them were decided in favour of the appellant and two were decided in favour of the respondents. On the application by the respondent to set aside and/or to remit for the reconsideration of the Arbitral
I Tribunal, of a part of the Arbitral Award at the High Court, the Judicial Commissioner ('JC') found the issue to be a mixed question of fact and law which permitted him to look into the

decision of the Arbitral Tribunal. The JC allowed the application and concluded that there was a manifest error of law on the fact of the award and that the Arbitral Tribunal had erred in coming to its decision. Subsequently, the Court of Appeal set aside the judgment of the JC. The appellant appealed to the Federal Court and leave was granted on, *inter alia,* the following questions (i) where an award from an international commercial arbitration is submitted for review before the Malaysian courts under s. 24(2) of the Arbitration Act 1952, and the contract provides for the application of one foreign law to govern the contract (the laws of India) and another foreign law to govern the arbitration agreement (the laws of England), is it proper for the Malaysian Court to apply Malaysian law exclusively to decide the scope of intervention in arbitration awards or the dispute at hand where the seat of arbitration was in Malaysia; (ii) if Malaysian law is to apply to determine the scope of intervention, is the common law limitation adopted in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* between a specific reference and a general reference as determining scope of intervention valid in the light of s. 24(2) which carries no limitations by itself or where a construction question is involved; (iii) whether the scope of intervention in arbitration awards under Malaysian law is that stated in *Ganda Edible Oils Sdn Bhd v. Transgrain BV*; (iv) whether the Court of Appeal, as did the majority arbitrators before them, erred in law in failing to appreciate that the paramount rule in the construction of contracts under Indian law is to ascertain the intention of the parties to the bargain and for this purpose rely on the definition to words given in the contract itself as opposed to reliance on commercial sense or industry practice as aids to construction.

Held (dismissing the appeal with costs)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) The parties had agreed on certain terms in the PSC (a) the parties had chosen Indian law as the proper law for contract; (b) they had chosen English law as the law to govern the arbitration agreement and (c) the arbitration proceedings were to be governed by the UNCITRAL Model Law, and that the seat of the arbitration proceedings was to be Kuala Lumpur. Malaysian courts, like the English courts,

A can give effect to the agreement of parties to apply foreign law (being the choice for substantive law) as opposed to curial law unless perhaps where the application of the foreign law runs contrary to the sense of justice or decency. (paras 18 & 19)

B **(1a)** The seat of the arbitration is the place where challenges to an award are made (*Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd*). The curial law ought to be that of the seat of arbitration. Thus, herein, as Kuala Lumpur C was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia. It was vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of D the courts of the seat of the arbitration including when considering applications to set aside awards. (paras 23, 25 & 27)

(2) Where a specific matter is referred to arbitration for E consideration, it ought to be respected in that "no such interference is possible upon the ground that the decision upon the question in law is an erroneous one". However, if the matter is a general reference, interference may be possible "if and when any error appears on the face of the F award." (*Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority*). Even where a specific reference had been made to the arbitrator, if the award subsequently made was tainted with illegality, it could be set aside by the courts on the ground that an error of law had been G committed. Discretion still lies with the court as to whether to respect the award of the Arbitral Tribunal or to reverse it. (paras 30 & 33)

(3) The construction of an agreement is a question of law. It follows that if the construction of an agreement is the sole H matter that is referred to arbitration, it is not open for challenge in the broad sense. Nevertheless, it still may yet be challenged in extremely limited circumstances *ie*, if the award is tainted with illegality, as was observed in *Ganda Edible Oils Sdn Bhd v. Transgrain BV* and as approved and followed in I *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd*. (para 36)

(4) The majority arbitrators rightly dealt with the matter by interpreting the PSC in the manner as the parties had agreed upon. There was nothing to indicate that the majority arbitrators had proceeded on a frolic of their own with total disregard to the PSC. The majority arbitrators did not base their award on "commercial sense and/or industry practices". The fact that questions of fact were considered by the majority arbitrators was quite immaterial. That by itself did not alter the specific nature of the reference. Hence, there were no elements of illegality in the award handed down by the majority arbitrators. The majority arbitrators in this case did not proceed illegally. (paras 49, 51 & 54-56)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memasuki satu usahasama minyak dan gas dengan responden-responden yang terlibat dengan pembangunan kawasan yang terletak di pantai luar India. Pihak-pihak yang terlibat telah memeterai satu kontrak perkongsian pengeluaran ('KPP'). Pertikaian timbul di antara pihak-pihak berhubungan kos-kos pemulihan yang dituntut oleh responden-responden dan pengiraan kadar cukai pulangan pos ('KCPP') seperti yang dikira oleh responden-responden. Pihak-pihak kemudiannya merujuk enam perkara untuk timbangtara.; empat daripadanya diputuskan bagi pihak perayu dan yang dua lagi bagi pihak responden-responden. Atas permohonan responden untuk mengenepikan dan/atau meremit untuk dipertimbangkan semula oleh Tribunal Timbangtara sebahagian award timbangtara tersebut, Pesuruhjaya Kehakiman ('PK') mendapati isu tersebut merupakan campuran persoalan undang-undang dan fakta yang membenarkannya menyemak keputusan Tribunal Timbangtara. PK membenarkan permohonan dan membuat kesimpulan bahawa terdapat kesilapan undang-undang yang jelas atas fakta award dan Tribunal Timbangtara telah terkhilaf semasa membuat keputusan. Kemudiannya, Mahkamah Rayuan telah mengenepikan penghakiman PK. Perayu membuat rayuan ke Mahkamah Persekutuan dan kebenaran telah diberikan atas, antara lain, persoalan-persoalan berikut (i) di mana award daripada timbangtara komersial antarabangsa dikemukakan di hadapan mahkamah-mahkamah Malaysia untuk semakan di bawah s. 24(2) Akta Timbangtara 1952, dan kontrak memperuntukkan penggunaan undang-undang asing untuk mentadbir kontrak (undang-undang India) dan lagi satu undang-undang asing untuk

A mentadbir persetujuan timbangtara (undang-undang England), sama ada mahkamah Malaysia wajar menggunakan undang-undang Malaysia secara eksklusif untuk menentukan skop campurtangan di dalam award timbangtara atau pertikaian di mana kerusi timbangtara adalah di Malaysia, (ii) jika undang-undang Malaysia B digunapakai untuk menentukan skop campurtangan, sama ada had masa undang-undang lazim yang digunakan di dalam *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* di antara rujukan khusus dan umum sebagai penentuan skop campurtangan sah menurut s. 24(2) yang tidak terhad secara C tersendiri atau di mana persoalan pembentukan terlibat; (iii) sama ada skop campurtangan di dalam award timbangtara di bawah undang-undang Malaysia seperti yang dinyatakan di dalam *Ganda Edible Oils Sdn Bhd v. Transgrain BV*; (iv) sama ada Mahkamah Rayuan, seperti juga majoriti timbangtara, silap dari segi undang-D undang dalam kegagalan menghargai peraturan yang paling penting dalam pembentukan kontrak di bawah undang-undang India iaitu untuk menentukan niat pihak-pihak bertawar-menawar dan bagi tujuan ini bergantung kepada definisi yang diberikan kepada perkataan-perkataan di dalam kontrak itu sendiri berbanding E dengan pergantungan kepada unsur komersial atau amalan industri sebagai bantuan bagi pentafsiran tersebut.

Diputuskan (menolak rayuan dengan kos)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

F

(1) Pihak-pihak terlibat telah bersetuju atas terma-terma tertentu di dalam KPP (a) pihak-pihak telah memilih undang-undang India sebagai undang-undang yang sesuai untuk kontrak; (b) mereka telah memilih undang-undang English sebagai undang-G undang mentadbir persetujuan timbangtara dan (c) prosiding timbangtara ditadbir oleh 'UNCITRAL Model Law', dan kerusi timbangtara adalah Kuala Lumpur. Mahkamah-mahkamah Malaysia, seperti mahkamah English, boleh memberi efek kepada persetujuan pihak-pihak untuk H menggunakan undang-undang asing (yang merupakan pilihan undang-undang substantif) berlawanan dengan undang-undang curial melainkan apabila penggunaan undang-undang asing bercanggah dengan keadilan atau kesopanan.

I **(1a)** Kerusi timbangtara adalah tempat di mana bantahan terhadap award dibuat (*Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd*). Undang-undang curial

sepatutnya di mana terletaknya kerusi timbangtara. Di sini, oleh kerana Kuala Lumpur telah dipilih sebagai kerusi perundangan timbangtara, undang-undang curial merupakan undang-undang Malaysia. Ia adalah penting untuk pihak-pihak mengikuti peraturan-peraturan mandatori kerusi timbangtara kerana penggunaan undang-undang prosedur mandatori kerusi tersebut (undang-undang curial) akan kekal tertakluk kepada bidangkuasa dan kawalan kerusi mahkamah-mahkamah timbangtara termasuk apabila mempertimbangkan permohonan untuk mengenepikan award.

(2) Apabila perkara spesifik dirujuk ke timbangtara untuk dipertimbangkan, patut dihormati bahawa "tiada campurtangan boleh dilakukan atas alasan bahawa keputusan mengenai persoalan undang-undang adalah salah". Walaubagaimanapun, jika perkara adalah rujukan umum, campurtangan hanya boleh dilakukan "jika dan apabila apa-apa kesalahan muncul di permukaan award." (*Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority*). Walaupun rujukan spesifik telah dibuat ke penimbangtara, jika award yang dibuat kemudiannya dicemari ketaksahan, ia boleh diketepikan oleh mahkamah atas alasan berlakunya kesalahan undang-undang. Budibicara masih terletak dengan mahkamah sama ada untuk menerima atau menolak award Tribunal Timbangtara

(3) Pembentukan satu persetujuan adalah persoalan undang-undang. Maka jika pembentukan persetujuan adalah perkara utama yang dirujuk kepada timbangtara, ia tidak terbuka untuk dibantah dalam erti kata yang luas. Walaubagaimanapun, ia masih boleh dibantah dalam keadaan yang amat terhad contohnya jika award dicemari ketaksahan, seperti yang didapati di dalam *Ganda Edible Oils Sdn Bhd v. Transgrain BV* dan dipersetujui serta diikuti *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd*.

(4) Majoriti penimbangtara telah menangani perkara yang dibangkitkan dengan betul melalui tafisran KPP seperti yang dipersetujui pihak-pihak terlibat. Tidak terdapat apa-apa yang menunjukkan bahawa majoriti timbangtara telah membuat keputusan sesuka hati tanpa merujuk kepada KPP. Majoriti timbangtara tidak membuat keputusan award berdasarkan "unsur komersial dan/atau amalan-amalan industri".) Fakta

bahawa persoalan-persoalan fakta dipertimbangkan oleh majoriti timbangtara tidak penting. Itu tidak mengubah sifat spesifik rujukan. Oleh itu, tidak terdapat elemen-elemen ketaksahan di dalam award yang diberikan. Majoriti penimbangtara di dalam kes ini tidak melakukan apa-apa yang salah dari segi undang-undang.

Case(s) referred to:

A v. B [2007] 1 Lloyd's LR 237 ***(refd)***

Absalom Ltd v. Great Western (London) Garden Village Society, Ltd [1933] AC 592 ***(refd)***

African & Eastern (Malaya) Ltd v. White Palmer & Co Ltd [1930] 36 Lloyd's LR 113 ***(refd)***

Bahamas International Trust v. Threadgole [1974] 1 WLR 1514 ***(refd)***

Black Clawson International Ltd v. Papierwerke Aschaftenburg AG [1981] 2 LLR 446 ***(refd)***

C v. D [2007] EWCA Civ 1282 ***(refd)***

Cairn Energy India Pty Ltd & Anor v. The Government Of India [2010] 2 CLJ 420 CA ***(refd)***

Channel Tunnel Group Ltd and Anor v. Balfour Beauty Construction Ltd and Others [1993] AC 334 ***(refd)***

Compagnie D'Armement Maritime SA v. Compagnie Tunisienne De Navigation SA [1971] AC 572 ***(refd)***

Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791 CA ***(refd)***

Dallah Real Estate and Tourism Holding Company (Appellant) v. The Ministry of Religious Affairs, Government of Pakistan (Respondent) [2010] UKSC 46 ***(refd)***

Dato' Teong Teck Kim & Ors v. Dato' Teong Teck Leng [1996] 2 CLJ 249 CA ***(refd)***

Ganda Edibile Oils Sdn Bhd v. Transgrain BV [1987] 2 CLJ 394; [1987] CLJ (Rep) 95 SC ***(refd)***

Government of India v. Cairns Energy India Pty Ltd & Ors [2003] 1 MLJ 348 ***(refd)***

Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***

Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC

King v. Duveen [1913] 2 KB 32 ***(refd)***

Kuwait Airways Corp v. Iraqi Airways [2002] 2 AC 883 ***(refd)***

Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd [2010] 1 CLJ 137 FC ***(refd)***

M/s Dozco India Ltd v. M/s Doosan Infracore Co Ltd (Arbitration Petition No. 5 of 2008) 2010 (9) UJ 4521 (SC) ***(refd)***

National Coal Board v. Wm Neill & Son [1984] 1 All ER 555 ***(refd)***

Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd [2007] 3 CLJ 185 CA ***(refd)***

Pioneer Shipping v. BTP Tioxide Ltd [1982] AC 724 ***(refd)***

Sami Mousawi Utama Sdn Bhd v. Kerajaan Negeri Sarawak [2004] 2 CLJ 186 CA ***(refd)***
Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1969] 1 LNS 172 HC ***(refd)***
Sumitomo Heavy Industries Ltd v. ONGC Ltd AIR 1998 SC 825 ***(refd)***
Terengganu Forest Products Sdn Bhd v. COSCO Container Lines Co Ltd & Anor & Other Applications [2011] 1 CLJ 51 FC ***(refd)***
The Government Of Sarawak v. Sami Mousawi-Utama Sdn Bhd [2000] 7 CLJ 228 HC ***(refd)***
Volvo Canada Ltd v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) 99 DLR (3d) 193 ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 24(2), 37
Courts of Judicature Act 1964, s. 96(a)

Other source(s) referred to:
Sundra Rajoo and WSW Davidson, *The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia,* Sweet & Maxwell, 2007, p 106

For the appellant - Dato' Cyrus Das (Saranjit Singh & Lam Ko Luen with him); M/s Saranjit Singh
For the respondents - Vinayak Pradhan (Darryl Goon, Ooi Huey Miin & Angeline Lee with him); M/s HM Ooi Assocs

[Appeal from Court of Appeal; Civil Appeal No: W-02-333-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

[1] This is an appeal by the appellant against the decision of the Court of Appeal which had on 15 September 2009 decided in favour of the respondents.

[2] The facts of this case have been succinctly dealt with in the two separate judgments of the Court of Appeal (See: *Cairn Energy India Pty Ltd & Anor v. The Government Of India* [2010] 2 CLJ 420). As such we will only make reference to the relevant facts and chronology for purposes of clarity in this judgment.

[3] The core of the dispute is related to an oil and gas joint venture. The appellant had entered into a joint venture with several private companies, including both respondents. The respondents were involved in the development of an area described as "Ravva Field" which is situated off the coast of India. A Production Sharing Contract ("PSC") was entered into by the parties to this effect.

[4] The salient provisions of the PSC read:

Article 3

...

3.3 ONGC Carry

In consideration of ONGC having paid the Past Costs, the Companies covenant to ONGC that they shall:

(a) during the Transfer Period, pay the share of Exploration Costs, Development Costs and Production Costs incurred by the Operator; and

(b) after the Transfer Period, pay the share of Contract Costs,

that would otherwise be payable by ONGC, in the proportion that their respective Participating Interests bear to their total Participating Interests, until such time as the amount paid by the Companies pursuant to this Article 3.3 equals the amount that is equivalent to the Companies' total Participating Interest share of the difference between Past Costs and Transfer Period Net Revenue PROVIDED THAT the Companies' obligations under this Article 3.3 shall not exceed the sum of thirty three million US Dollars (US$33 million) less an amount equivalent to the Companies' total Participating Interest share of Transfer Period Net Revenue to which but for Article 7.5(c) the Companies would otherwise be entitled. Thereafter, Contract Cost shall be borne and paid by the Companies and ONGC in proportion to their Participating Interest.

...

Article 15

Recovery Of Costs For Oil And Gas

15.1 Contractor Entitled to Recover Contract Costs and Past Costs

The Contractor shall be entitled to 100% of the total volumes of Petroleum produced and saved from the Contract Area in accordance with the provisions of this Article until the value of

such Petroleum entitlement, after deduction of all applicable levies including all Royalty and Cess paid in respect of Petroleum produced and saved from the Contract Area, is equal to Contract Costs together with Past Costs. For the avoidance of doubt, it is agreed that Past Costs shall not exceed the sum of fifty five million US Dollars ($US55 million) for the purposes of cost recovery.

Article 16

Production Sharing Of Petroleum Between Contractor And Government

16.1. Profit Petroleum Determined by PTRR Method

(a) The Contractor and the Government shall share in the Profit Petroleum from the Contract Area in accordance with the provisions of this Articles.

(b) The share of Profit Petroleum, in any Year, shall be calculated for the Contract Area on the basis of the Post Tax Rate of Return actually achieved by the Companies at the end of the preceding Year for the Contract Area as provided in Appendix D.

…

Appendix D

(Article 16.4)

Calculation Of The Post Tax Rate Of Return For Production Sharing Purposes

1. In accordance with the provisions of Article 16, the share of the Government and the Contractor respectively of Profit Petroleum from any Filed in any Year shall be determined by the Post Tax Rate of Return (hereinafter referred to as PTRR) earned by the Companies from the Contract Area at the end of the preceding Year. These measures of profitability shall be calculated on the basis of the appropriate net cash flows as specified in this Appendix D.

2. In order to assess the PTRR earned by the Company(ies) in the Contract Area over any period up to the end of any particular Year, the following net cash flow of the Company(ies) arising from the Contract Area for each Year separately will first be calculated as follows:

(i) Cost Petroleum entitlement of the Companies as provided in Article 15;

plus

(ii) Profit Petroleum entitlement of the Companies as provided in Article 16;

plus

(iii) the Companies' share of all incidental income (of the type specified in Section 3.4 of the Accounting Procedure) arising from Petroleum Operations;

less

(iv) the Companies' share of those Production Costs incurred on or in the Contract Area;

less

(v) the Companies' share of those Exploration Costs (if any) incurred in the Contract Area;

less

(vi) the Companies' share of Development Costs in the Contract Area, which, for the purposes of this paragraph 2(vi), shall be all of the Development Costs without regard to the provisions of Articles 15.5(b);

less

(vii) the notional income tax, determined in accordance with paragraph 7 of this Appendix, payable by the Companies on profits and gains from the Contract Area.

provided, however, that any costs or expenditures which are not allowable as provided in Section 3.2 of the Accounting Procedure shall be excluded from Contract Costs and disregarded in the calculation of the annual net cash flow.

[5] Dispute arose regarding the costs recoveries claimed by the respondents and the calculation of Post Tax Rate of Return (PTRR) as computed by the respondents. The parties therefore referred six points for arbitration. Four of them were decided in favour of the appellant and the remaining two were decided in favour of the respondents. The appellant challenged one of the points decided in favour of the respondents, namely, "whether the companies are entitled to include in the accounts, for the purposes

of PTRR calculation in accordance with the provisions of art. 16 and Appendix D of the said Contract, sums paid by the Companies in accordance with art. 3.3 of the said Contract". A

[6] On this point, the majority of the Arbitral Tribunal found that "the companies are entitled to include in the accounts, for the purposes of PTRR calculation (in accordance with the provisions of art. 16 and Appendix D of the said [contract]), sums paid by the companies in accordance with art. 3.3 of the said contract". B

[7] On the application by the respondent to set aside and/or to remit for the reconsideration of the Arbitral Tribunal, of a part of the Arbitral Award at the High Court, Kuala Lumpur, the learned Judicial Commissioner found the issue to be a mixed question of fact and law which permitted him to look into the decision of the Arbitral Tribunal. The learned Judicial Commissioner in allowing the application concluded that there was a manifest error of law on the fact of the award and that the Arbitral Tribunal had erred in coming to its decision on the said issue. The respondents appealed to the Court of Appeal. C D E

[8] The learned judges of the Court of Appeal were unanimous in their final outcome but divided in their approach. The judgment of the learned Judicial Commissioner was set aside. The majority ruled that the issue in question was a question of construction which was a specific question of law and therefore it was not permissible for the court to scrutinize the award of the Arbitral Tribunal on that point. However, the minority view was that the question involved a mixed question of fact and law which permitted the court to scrutinize the award, but nevertheless found there was no error of law committed by the Arbitral Tribunal. F G

[9] Thus, against the decision of the Court of Appeal the appellant appeals to the Federal Court. Leave was granted on the following five questions:

(a) Where an award from an international commercial arbitration is submitted for review before the Malaysian Courts under s. 24(2) of the Arbitration Act 1952, and the contract provides for the application of one foreign law to govern the contract (namely the laws of India) and another foreign law to govern the arbitration agreement (namely the laws of England), is it proper for the Malaysian Court to apply H I

A Malaysian law exclusively to decide the scope of intervention in arbitration awards or the dispute at hand where the seat of arbitration is in Malaysia?

(b) If English law is to apply as the choice of the parties, whether
B the appropriate law is that as stated in the English Arbitration Act 1979 (amending the English Arbitration Act 1950) which provides for an appeal to the High Court on any question of law arising out of an award?

C (c) If Malaysian law is to apply to determine the scope of intervention, is the common law limitation adopted in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1969] 1 LNS 172; [1971] 2 MLJ 210 between a specific reference and a general reference as determining scope
D of intervention valid in the light of s. 24(2) which carries no limitations by itself or where a construction question is involved?

(d) Whether the scope of intervention in arbitration awards under Malaysian Law is that stated in *Ganda Edibile Oils Sdn Bhd v. Transgrain BV* [1987] 2 CLJ 394; [1987] CLJ (Rep) 95 given
E that conflicting positions are presently being taken by the Court of Appeal over the question? For example, the Court of Appeal in *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788 and *Pembinaan LCL Sdn Bhd v. SK*
F *Styrofoam (M) Sdn Bhd* [2007] 3 CLJ 185 has expressly rejected the Ganda Oils ratio but the Court of Appeal in *Crystal Realty Sdn Bhd v. Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791 has endorsed it?

G (e) Whether the Court of Appeal, as did the Majority Arbitrators before them, err in law in failing to appreciate that the paramount rule in the construction of contracts under Indian law is to ascertain the intention of the parties to the bargain and for this purpose rely on the definition to words given in
H the contract itself as opposed to reliance on commercial sense or industry practice as aids to construction?

[10] During the hearing of this appeal submissions on questions 1 and 2 were taken together. Likewise questions 3 and 4 were also dealt with together while question 5 was dealt with on its
I own. As such we will consider those questions in the same sequence.

[11] However, before proceeding to deal with the merit of this appeal we should dispose of one preliminary issue raised by learned counsel for the respondents.

Preliminary Issue

[12] The respondents submitted that the above questions (especially questions 1 to 4) were not decided by the Court of Appeal and are now being raised for the first time before the Federal Court. It was argued that these questions should not be entertained by this court. The respondents placed their reliance on s. 96(a) of the Courts of Judicature Act 1964 (the Act) and the recent judgment of this court in *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51.

[13] With respect, we do not think we should revisit the basis for the grant of the leave including questions 1 to 4. The respondents ought to have put forth such argument at the hearing of the leave application. The appellant in its submission state the respondents did raise this at the leave stage. In any event we are of the view that once leave has been granted by this court in the first instance, it ought to be respected at the appeal proper stage. (See: *Terengganu Forest Products Sdn Bhd (supra)*). It is noteworthy to mention that the leave stage is but a mere first hurdle for an appellant/applicant. During the hearing of the appeal proper it is for the parties to fully canvass their respective positions *vis-à-vis* the judgment of the Court of Appeal. As such we do not find it necessary to rule on the preliminary issue.

[14] We now proceed to consider the questions before us.

Questions 1 & 2

[15] In our view question 2 would only come into effect if question 1 is decided in favour of the appellant. Question 1 primarily is on the effect of the seat of arbitration. The appellant seeks to argue that English law applies and thus the Court of Appeal ought to have applied the appellate power allowed under the Arbitration Act 1979 of the United Kingdom, and not the common law rule of distinguishing between a general reference and a specific reference.

[16] The majority of the Court of Appeal refused to interfere as it had found the matter to be a specific reference. The majority also were of the view that even if they were wrong on that point, there was still no error of law committed by the Arbitral Tribunal for them to interfere with. The minority view was that the issue was a mixed question of law and fact and therefore it was open for the court to interfere, but declined to do so as there was no error of law.

[17] The respondents on the other hand rely on the parties specific choice of choosing Kuala Lumpur, Malaysia as the seat of arbitration and thus effect must be given to that choice. The respondents also contend that it was the appellant who had filed the case in the Malaysian court and had relied on Malaysian law in doing so. No reference was made to English law. The respondents also submitted that if the appellant is of the view that English law ought to apply, they should have filed their challenge before the English court. It was further argued that in the courts below, the parties had relied heavily on Malaysian law without any such opposition. The appellant conceded this in their submission before this Court but sought to rely on the case of *Bahamas International Trust v. Threadgole* [1974] 1 WLR 1514 to say that an erroneous reading or concession on the interpretation of a contract is not binding and it is open to a court to apply the correct law or construction of the contract.

[18] Now, the parties agreed on certain terms in the PSC. By art. 33.1 of the PSC, the parties chose Indian law as the proper law of the contract. By art. 34.12, they chose English law as the law to govern the arbitration agreement. By art. 34.9, the arbitration proceedings were to be governed by the UNCITRAL Model Law, and that the seat of the arbitration proceedings was to be Kuala Lumpur. It is not uncommon, albeit rare, for parties to agree as such – see *Black Clawson International Ltd v. Papierwerke Aschaftenburg AG* [1981] 2 LLR 446 at 453; *Channel Tunnel Group Ltd and Anor v. Balfour Beauty Construction Ltd and Others* [1993] AC 334.

[19] At the outset we do not agree with the contention of the respondents that the appellant should have filed its challenge before the English court if it seeks to rely on English law. Malaysian courts, like the English courts, can give effect to the agreement of parties to apply foreign law (being the choice of

substantive law) as opposed to curial law unless perhaps where the application of the foreign law runs contrary to the sense of justice or decency.

[20] This principle can be extracted from the House of Lords decision in *Kuwait Airways Corp v. Iraqi Airways* [2002] 2 AC 883 per the speech of Lord Nicholls at p. 1078:

> The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court. The laws of the other country may have adopted solutions, or even basic principles, rejected by the law of the forum country. These differences do not in themselves furnish reason why the forum court should decline to apply the foreign law.

(See also: *Dallah Real Estate and Tourism Holding Company (Appellant) v. The Ministry of Religious Affairs, Government of Pakistan (Respondent)* [2010] UKSC 46).

[21] The next point to consider is whether the parties intended English law or Malaysian law to be the "curial law", ie, the law applicable for a challenge to an arbitral award, and in this case would include the Arbitration Act 1952, now replaced by the Arbitration Act 2005. The Appellant relies heavily on a decision by the Indian Supreme Court, namely *Sumitomo Heavy Industries Ltd v. ONGC Ltd* AIR 1998 SC 825 (recently endorsed by the Supreme Court of India in *M/s Dozco India Ltd v. M/s Doosan Infracore Co Ltd* (Arbitration Petition No. 5 of 2008) 2010 (9) UJ 4521 (SC)), which states that the "curial law" seizes to have effect once the arbitral tribunal has handed down its award. The Supreme Court of India in *Sumitomo Heavy Industries (supra)* said the following at paras. 12, 15 and 16:

> The proceedings before the arbitrator commence when he enters upon the reference and conclude with the making of the award. As the work by Mustill and Boyd aforementioned puts it, with the making of a valid award the arbitrator's authority, powers and duties in the reference come to an end and he is *'functus officio*".

> The enforcement process is subsequent to and independent of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration.

A The law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement.

[22] Thus, the appellant submits that English law applies for the setting aside of the award since the curial law of the seat of arbitration had lapsed upon the grant of the award. The respondents reject this approach and argue that the curial law effectively remains to be Malaysian law for the setting aside of the award.

[23] We are inclined to agree with the contention of the respondents. Our courts had in a prior occasion taken the view that the seat of the arbitration is the place where challenges to an award are made. In *Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137, this court referred to the English case of *A v. B* [2007] 1 Lloyd's LR 237 which decided that challenges are to be made at the courts of the seat of arbitration. Thus, for now we find no reason to depart from the current position of the law.

[24] Indeed in *C v. D* [2007] EWCA Civ 1282; [2007] All ER (D) 61 Longmore LJ at para. 17 said this:

> **It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award**. As the judge said in para. 27 of his judgment, as a matter of construction of the insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of the 1996 Act. He added that their agreement on the seat and the "curial law" necessarily meant that any challenges to any award had to be only those permitted by that Act. In so holding he was following the decisions of Colman J in *A v. B* [2006] EWHC 2006 (Comm), [2007] 1 All ER (Comm) 591, [2007] 1 Lloyd's Rep 237 and *A v. B (No 2)* [2007] EWHC 54 (Comm), [2007] 1 All ER (Comm) 633, [2007] 1 Lloyd's Rep 358 in the first of which that learned judge said (para. 111):
>
> ... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.
>
> That is, in my view, a correct statement of the law ... (emphasis added).

[25] It is therefore clear that the English Court of Appeal clearly sets out that the curial law ought to be that of the seat of arbitration. As stated above, our courts have adopted a similar position. Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards. We are therefore not persuaded that the decisions of the Indian Supreme Court should be applied.

[26] In *Compagnie D'Armement Maritime SA v. Compagnie Tunisienne De Navigation SA* [1971] AC 572 Lord Diplock had said that the "express choice of forum by the parties to a contract necessarily implies an intention that their disputes shall be settled in accordance with the procedural law of the selected forum and operates as if it were also an express choice of the curial law of the contract."

(See also: Sundra Rajoo and WSW Davidson in *The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia*, Sweet & Maxwell, 2007. Although it discusses the Arbitration Act 2005 it also makes reference (at p. 106) to the general point that where the seat of arbitration is in Malaysia the High Court in Malaysia will intervene 'to lend support for issues arising under for example'. *inter alia* s. 37 which deals with setting aside awards).

[27] Accordingly our answer to question 1 is in the affirmative. As such there is no necessity to answer question 2.

Questions 3 & 4

[28] Question 3 deals with the common law distinction between a specific reference and a general reference for arbitration in determining the scope of intervention by the courts (see: *Sharikat Pemborong Pertanian (supra)*). The appellant submits that such a distinction cannot be found in the words of s. 24(2) of the Arbitration Act 1952. Thus such a distinction ought to be questioned. In short the appellant urged this court to depart from the current long line of authorities adopting such a distinction.

[29] This court in *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743 upheld the distinction that was made in *Sharikat Pemborong (supra)* in the following terms - "As to the determination of whether the award has been improperly procured, this must depend on the issues or the questions that have been referred to the arbitrator. It is from these issues or questions that the arbitrator has to make findings of fact on the evidence adduced before him and more often than not, questions of law arise from his findings of fact. It is under these circumstances that Raja Azlan Shah J in *Sharikat Pemborong* sounded a warning that reads as follows - 'It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between the two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'."

[30] With respect we are not persuaded that we should depart from the long line of authorities holding such a distinction. Thus, where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'. However, if the matter is a general reference, interference may be possible 'if and when any error appears on the face of the award'. (See: *Sharikat Pemborong Pertanian (supra)*). (See also: *King v. Duveen* [1913] 2 KB 32 and *Absalom Ltd v. Great Western (London) Garden Village Society, Ltd* [1933] AC 592).

[31] The next point requiring to be considered is:

(i) whether the cases of *Ganda Edibile (supra)* and *Intelek Timur (supra)* introduced a ground for challenge in cases where a specific reference was made for arbitration, namely, that an act of illegality has been committed by the arbitrator, such as deciding on evidence which was not admissible, or on principles of construction which the law does not countenance;

and

(ii) whether the question of construction of a contract is a question of law, which if specifically referred to arbitration, ought to fall within the ambit of the above distinction as laid down in *King v. Duveen (supra)*. A

[32] With reference to item (i), in *Ganda Edibile (supra)*, Barakbah SCJ stated the following: B

> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the Court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award. C D

A substantial portion of these words were reproduced by this court in *Intelek Timur (supra)*. However, it must be pointed out that both cases expressly endorsed *Sharikat Pemborong (supra)*. E

[33] In our view the Supreme Court in *Ganda Edibile (supra)* and the Federal Court *Intelek Timur (supra)* did not introduce any new ground for challenge. Both cases merely reiterated a fundamental principle of law, to wit, that if a decision of an arbitrator is tainted with illegality, it is always open for challenge. Thus, even where a specific reference has been made to the arbitrator, if the award subsequently made is tainted with illegality, it can be set aside by the courts on the ground that an error of law had been committed. It must be stressed here that the award must be tainted with some sort of illegality. It must also be emphasized that the word "may" is used here, in that the award may be set aside. Discretion still lies with the court as to whether to respect the award of the arbitral tribunal or to reverse it. F G H

[34] As for item (ii), the Supreme Court in *Ganda Edibile (supra)* did state that construction is, generally speaking, a question of law. In our view all matters regarding the construction of a document is a question of law. It may very well be that in some cases, other matters are brought up for consideration which may involve questions of fact, but where the matter solely referred to I

A is the construction of a document, it must be said to be solely a question of law. In our view, the words "generally speaking" used by the Supreme Court are to cater for the above situation where questions of fact are involved.

B **[35]** In *Bahamas International Trust (supra)* Lord Diplock in the course of his speech stated that "the construction of a written document is a question of law". (See also: *Pioneer Shipping v. BTP Tioxide Ltd* [1982] AC 724 and *National Coal Board v. Wm Neill & Son* [1984] 1 All ER 555).

C **[36]** To reiterate we hold that the construction of an agreement is a question of law. It follows that if the construction of an agreement is the sole matter that is referred to arbitration, it is not open for challenge in the broad sense. This is in accordance with *Sharikat Pemborong (supra)* and *King v. Duveen (supra)*.
D Nevertheless, it still may yet be challenged in extremely limited circumstances, ie, if the award is tainted with illegality, as was observed in *Ganda Edibile (supra)* and as approved and followed in *Intelek Timur (supra)*. Our answer to question 3 is therefore in the affirmative.
E

[37] In respect of question 4 it calls for the consideration of the decision in *Ganda Edibile (supra)* in the light of the decisions in *Hartela (supra)* and in *Pembinaan LCL (supra)* which according to the appellant had rejected the said Supreme Court decision, and
F the case of *Crystal Realty (supra)* which had endorsed the same.

[38] To answer this question, a careful reading of the said three decisions (excluding *Crystal Realty (supra)*) is necessary. The Court of Appeal in both *Hartela (supra)* and *Pembinaan LCL (supra)*
G clearly was aware that the Supreme Court decision was binding upon them. Upon careful reading of the said cases, we are of the view that all three decisions can be read harmoniously. We need only refer to the case of *Government of India v. Cairns Energy India Pty Ltd & Ors* [2003] 1 MLJ 348, a case although involving the
H same parties but on a different matter altogether (and not related to the present proceedings), wherein the High Court stated as follows:

> I am of the view, with the greatest of respect, that the
I interpretation placed by the Court of Appeal in the case of *Hartela Contractors Ltd* on the Supreme Court's judgment in the case of *Ganda Edible Oils* is incorrect. A clear reading of *Ganda Edible Oils* (the relevant passages which were reproduced earlier) clearly

reflect that the courts have the right to intervene where the arbitrator has made wrong inferences of fact or has considered inadmissible evidence, otherwise there was no reason for it to state the 'two questions that should have arisen before the judge ...'. The apparent conflict of both decisions have been judiciously considered in the case of *The Government of Sarawak v. Sami Mousawi-Utama Sdn Bhd*, in particular at pp 447-448. The learned High Court judge concluded that both cases can be read harmoniously as both *Hartela Contractors Ltd* and *Ganda Edible Oils* have decided different principles, namely:

(a) *Hartela Contractors Ltd* decided that inadmissible evidence must result in violations of the rules of evidence relating to natural justice which is repugnant to one's sense of justice or fairness before an award can be set aside (see p. 448, para A–B of authority);

(b) *Ganda Edible Oils* decided that failure to analyze and appraise evidence will vitiate an award if the evidence is material, relevant and had gone to affect the award.

I would adopt the harmonious interpretation pronounced by the judge in the case of *The Government of Sarawak v. Sami Mousawi-Utama Sdn Bhd* ...

[39] It should be noted that *The Government of Sarawak v. Sami Mousawi-Utama Sdn Bhd* [2000] 7 CLJ 228 which was decided by the High Court, has since been upheld on appeal by the Court of Appeal (see *Sami Mousawi Utama Sdn Bhd v. Kerajaan Negeri Sarawak* [2004] 2 CLJ 186).

[40] As such, we hold that there is no conflict between the Supreme Court decision in *Ganda Edibile (supra)* and the Court of Appeal decisions of *Hartela (supra)* and *Pembinaan LCL (supra)*. All three cases can be read harmoniously. For completeness, we hold that even if there is any conflict between the said cases, the decision of the Supreme Court (as endorsed by this court in *Intelek Timur (supra)*) would, for obvious reasons, prevail. Our answer to Question 4 is therefore in the affirmative.

Question 5

[41] Question 5 relates to whether the Court of Appeal in coming to its decision, as did the Majority Arbitrators, applied the wrong approach when construing the PSC (contract).

[42] In order to properly answer this question 5 it may be helpful to first note what was said in *Sharikat Pemborong (supra)* at p. 211:

> It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one. Instances of the former are afforded by *Absalom Ltd v. Great Western (London) Garden Village Society Ltd* [1933] AC 592, *British Westinghouse Electric & Manufacturing Co Ltd v. Underground Railways Co of London Ltd* [1912] AC 673 *Hodgkinson v. Fernie* 3 CB (NS) 189; 140 ER 712, and *Attorney-General For Manitoba v. Kelly And Others* [1922] 1 AC 268 281 PC. *Government Of Kelantan v. Duff Development Co Ltd* [1923] AC 395 411, and *In re King and Duveen* [1913] 2 KB 32 are instances of the latter..

[43] And in *Ganda Edibile (supra)*, it was pointed out that where the matter referred to for arbitration is a question of construction, it is a question of law and comes within the category of specific reference. The award of the arbitrator cannot therefore be set aside unless there is illegality 'as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award'.

[44] In this case it is not in dispute that the matter referred for arbitration is one of construction of the terms in the PSC, a question of law and thus a specific reference. Therefore it is necessary for the appellant to show illegality.

[45] Learned counsel for the appellant submitted that under Indian law, to which the PSC was subject to, the paramount rule is to determine the intention of the parties and not to rely on the commercial factors or industry practices as aids to construction. Learned counsel argued that the Majority Arbitrators failed to adhere to the paramount rule. He relied on the passage in the award which reads:

> The conclusion is that granting the words in Appendix D(2)(iv) - (vi) their natural meaning accords with the general scheme of Articles 15 and 16 and, as well, **commercial sense**. There is

simply no basis for reading Post Tax Rate of Return as excluding those expenses incurred by the Companies under Article 3.3 after the Effective Date. (emphasis is added)

[46] The respondents contend that the Majority Arbitrators did not take into consideration commercial and industry factors in coming to its decision but only referred to them in passing.

[47] Now, being a specific reference, all that is left to be considered is:

(1) whether the Majority Arbitrators did in actual fact place reliance on the commercial sense and/or industry practices as aids of construction;

and

(2) if the above is in the affirmative, whether this amounts to an illegality of which the courts are permitted to intervene.

[48] The majority of the Court of Appeal were of the view that the Majority Arbitrators did not take into account the commercial sense or industry practices in coming to its decision. It stated that "the Arbitral Tribunal merely said in conclusion that its award accorded not only with arts. 15 and 16, but also with commercial sense. Paragraph 261 could not possibly be read that the Arbitral Tribunal had constructed the PSC on the basis of commercial sense."

[49] We have no reason to disagree with the majority of the Court of Appeal. The reference to "commercial sense" was merely incidental and supportive. There is nothing to indicate that the Majority Arbitrators had proceeded on a frolic of their own with total disregard to the PSC. On the contrary, we are of the view that the Majority Arbitrators rightly dealt with the matter by interpreting the PSC in the manner as the parties had agreed upon.

[50] Quite a similar situation confronted the Supreme Court in *Ganda Edibile (supra)* and it was approached in the following words:

At para. 9 of the award, the arbitrator wrote:

A buyer in receipt of a bad tender must decide immediately to accept or reject the same. If a buyer could accept or reject after 8-15 days there would be chaos in the trade. Clearly this cannot prevail.

That was the passage that led the trial Judge to conclude that the arbitrator in making the award relied on custom of trade, and in the circumstances therefore it was immaterial whether s. 42 of SGO applied or not.

It was submitted by the Counsel for the appellant that the arbitrator could not be relying on custom of trade without making a finding as to what the custom was. The learned Counsel for the respondent conceded that the issue of custom and usage was not contended by either party before the arbitrator. He further submitted that the arbitrator could have relied on the facts and circumstances of the case without the necessity of resorting to ss. 37 and 42 of SGO. We are of the view that the passage at para. 9 cannot by itself alter the arbitrator's ground based on the provision of the SGO into that of custom of trade. He was only expressing his view based on the facts and circumstances of the case as described in the preceding paragraphs of his award, of the effect of unreasonable delay in rejecting the tender.

One has to understand what is meant by "custom of trade" before dealing with the subject. A custom is a particular rule which has existed either actually or presumptively from time immemorial and obtained the force of law in a particular locality. It is distinguishable from particular trade or local usages which have been imported as express or implied term into commercial or other contracts.

No doubt s. 37(4) of SGO makes the provisions of the section to be subject to any usage of trade, special agreement or course of dealing between the parties. The arbitrator may apply his own knowledge of the usage, but before that can be done, there must be sufficient material for its inclusion. It follows that where persons execute a contract under circumstances governed by usage, the usage when proved, must be considered as part of the agreement. In general, every usage must be notorious, certain and reasonable and must not offend against the intention of any statute. By notorious, it means that it has acquired such notoriety in a particular branch of trade or business or amongst the class of persons who are affected by it, that any person who enters into a contract affected by the usage, must be taken to have done so with the intention that the usage should form part of the contract. By certainty, usage is required to be as certain as the written contract itself. It must be uniform and reasonable before it can be imported into a contract. (*Halsbury's Laws of England*, 4th edn., vol. 12, pp. 4, 30 and 33). In the light of the above, we agree that the subject of custom of trade or usage was never an issue in the arbitration case. In the absence of any proof expressly or by implication as to the particular custom being a part of the agreement which in turn was neither disputed nor

> exhibited in the record before us, we are of the view that the learned Judge was wrong in concluding that the arbitrator based his finding on custom of trade.

[51] Therefore, adopting the same rationale, we find that the learned Majority Arbitrators did not base their award on "commercial sense and/or industry practices". As was said earlier, at the very most the Majority Arbitrators merely mentioned it in passing; as an incidental or supportive ground.

[52] We note that the Arbitrators were faced with a question on the construction of a clause in an agreement. From the reading of it, no doubt it could be given two interpretations - one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. The fact that the learned Majority Arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge.

[53] And as Scrutton LJ put it "... if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesar's judgment." (See *African & Eastern (Malaya) Ltd v. White Palmer & Co Ltd* [1930] 36 Lloyd's LR 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim v. Dato' Teong Teck Leng* [1996] 2 CLJ 249).

[54] The fact that questions of fact were considered by the Majority Arbitrators is quite immaterial. That by itself does not alter the specific nature of the reference. The decision of the Supreme Court of Canada in *Volvo Canada Ltd v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* (UAW) 99 DLR (3d) 193 is instructive on this point. Laskin CJ at p 206 stated as follows:

> However difficult it may be at times to determine whether a specific question has or has not been referred, I think it is more likely to be such a question where, as here, a policy question has been put to the arbitrator. Moreover, as Barwick CJ put it in the *NSW Mining Co* case, *supra*, it is the nature of the question that determines the matter and that is not altered even if the arbitrator has to find some facts in order to decide it. I am satisfied in this case, as were the Courts below, that the arbitrator was faced with answering a specific question of law.

[55] Accordingly, we find that there are no elements of illegality in the award handed down by the Majority Arbitrators. And in this regard, we quote the words of Martland J in *Volvo Canada Ltd (supra)* - "I agree with the Chief Justice that the application of the statement in the circumstances of the present case would not entitle the court to set aside the award. The arbitrator did not proceed illegally. He did answer the question of law put to him, as he was required to do."

[56] Similarly, we find that the Majority Arbitrators in the present case did not proceed illegally. They answered the question of law as was put to them and that was all that was required of them. Our answer to question 5 is therefore in the negative.

[57] For the above reasons, this appeal is therefore dismissed with costs.